



# TEXAS ETHICS COMMISSION



## ETHICS ADVISORY OPINION NO. 192

March 25, 1994

*Whether a state employee may accept outside employment with a private company to consult with and assist the company in developing training programs and materials. (AOR-216)*

The Texas Ethics Commission has been asked whether a state employee may accept outside employment with a private company to consult with and assist the company in developing training programs and materials. The general content of the training programs would be similar to the types of programs implemented by the employee in his state position. The requestor asks whether such a "private, profit-making venture" would be prohibited if the consulting and writing of programs were done on personal time (outside agency business hours) and on privately owned equipment. Statutes within the jurisdiction of the Ethics Commission<sup>1</sup> that may apply to this question include chapter 36 of the Penal Code and chapter 572 of the Government Code. Before considering the application of these general statutes, however, a state employee should ascertain whether his agency's policy and the laws specifically applicable to his agency permit such outside employment.<sup>2</sup>

Section 36.07 of the Penal Code prohibits the acceptance of an honorarium. Under subsection (a) an offense occurs if a public servant "solicits, accepts, or agrees to accept an honorarium in consideration for services that the public servant would not have been requested to provide *but for the public servant's official position or duties.*" (Emphasis added.) To determine whether the honorarium prohibition applies in a specific situation, the public servant must first ascertain whether he would not have been asked to perform the services but for his official position. [Ethics Advisory Opinion No. 173](#) (1993). The critical issue is whether the public employee's *status* as a public employee is a reason the public employee was asked to perform a private service.<sup>3</sup> A fee is not a prohibited honorarium simply because the public employee uses skills or knowledge he acquired as a public servant.<sup>4</sup> Whether a violation of the honorarium prohibition has occurred in a particular instance is generally a question of fact. [Ethics Advisory Opinion No. 125](#) (1993).

It is the state's policy that no state officer or employee should have a direct or indirect interest or engage in any professional activity that is in substantial conflict with the proper discharge of the officer's or employee's public duties. Gov't Code § 572.001. Section 572.051 of the Government Code sets out standards of conduct to accomplish this policy. *Id.* § 572.051(2), (3) (a state employee should not accept other employment or compensation that might induce the employee to disclose confidential information or that could reasonably be expected to impair the employee's independence of judgment in the performance of his official duties). Assuming that agency policy and other laws permit the outside employment in question, a state officer or employee must decide for himself whether his actions violate state policy and standards of conduct. [Ethics Advisory Opinion No. 156](#) (1993) (compliance with standards set out in section 572.051 is a matter of personal ethics).

### SUMMARY

In addition to agency policy and laws applicable to specific agencies, sections 36.07 and 36.08 of the Penal Code and chapter 572 of the Government Code may restrict outside employment by state employees.

<sup>1</sup> The Ethics Commission has interpretative authority over the following laws: Government Code chapters 302 (campaigns for speaker of the house), 305 (lobby registration and reports), and 572 (financial disclosure and standards of conduct); Election Code title 15 (political funds and campaigns); and Penal Code chapters 36 and 39 (bribery and abuse of office).

<sup>2</sup> A state employee is not prohibited per se from simultaneously holding both state and private employments. *See* Attorney General Opinion JM-188 at 2 (1984). However, if a conflict of interest exists the state agency may prohibit the outside employment. *See, e.g.*, Attorney General Opinions JM-188 (1984) (state agency may prohibit employee's outside employment where dual employment creates conflict by competing with state agency for court appointments and revenue), H-1317 (1978) (state agency may not prohibit employees from being licensed as real estate brokers or agents where no conflict of interest exists and the employee's performance is in no way impaired); Attorney General Letter Opinion 90-43 (1990) (Department of Human Services may not prohibit employees from performing counseling services on their own time unless it can show there would be an adverse affect on the department). Before engaging in any outside employment, a state employee should examine the statutes and regulations specific to the employee's agency to see if there are any prohibitions against dual employment. Further questions about specific conflicts of interest should be directed to the agency's general counsel or to the attorney general.

<sup>3</sup> Section 36.08 of the Penal Code contains a number of provisions prohibiting certain state employees from accepting a benefit from specified categories of individuals and entities. *See generally* [Ethics Advisory Opinion No. 130](#) at 3 (1993). A salary or other payment is a benefit. [Ethics Advisory Opinion No. 148](#) (1993). Therefore, before a state employee accepts payment for outside work, the employee should ascertain whether one of the prohibitions in section 36.08 is applicable to the payment. If one of those prohibitions is applicable, the state employee may accept the payment only if there is an applicable exception to section 36.08, such as the exception for payments for which the public servant renders services in a capacity other than as a public servant. *See* Penal Code § 36.10.

<sup>4</sup> The Ethics Commission has stated that section 36.07 applies to speakers fees and to teaching at a college. [Ethics Advisory Opinions Nos. 148](#) (1993), [17](#) (1992). The Ethics Commission has not considered whether there are circumstances in which a fee may not be an honorarium.